No. 1198

MAY 3 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946.

WEST KENTUCKY COAL COMPANY

versus

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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159773

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PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, West Kentucky Coal Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the above case.

OPINION BELOW.

The opinion of the Court below is reported in National Labor Relations Board v. West Kentucky Coal Company, No. 9936, 152 F. (2d) 198.

JURISDICTION.

This is an application for review of the final decree of the United States Circuit Court of Appeals for the Sixth Circuit on a petition for enforcement of an order of the National Labor Relations Board as authorized by Section 160, Title 29, U. S. C. A., same being Section 10 (e) of the National Labor Relations Act, and Section 347, Title 28, U. S. C. A.

QUESTIONS PRESENTED.

The questions presented grow out of emergency seizure of coal mines in a national crisis. Further similar emergency action is inevitable. The questions, which are novel, will arise again. Since the Government sooner or later will again find it necessary to break a coal famine which threatens to destroy all industrial progress toward reconversion or which may precipitate another economic disaster, the questions are of such immediate importance as to require consideration by this Court.

They are novel in that they grow out of the procedure and orders of the National Labor Relations Board in a situation in which the President of the United States, acting through the Secretary of the Interior, was the employer or operator, against whom the Board was acting in the interest of the United Mine Workers of America in the crisis created by a cessation of coal production in time of war.

1. This petitioner contended that all of its production and maintenance employees in all of the six (6) coal mines then being operated by it in three (3) counties in Western Kentucky, should be included in an appropriate unit for collective bargaining. The union, though it had agreed to the above prior to elections held in 1941 as to mines then in operation, contended that each of four (4) mines should be separate units.

November 5, 1943, within a few hours after petitioner received official notice that the President of the United States through the Secretary of the Interior, had taken charge of the operation of petitioner's coal mines, an Examiner of the National Labor Relations Board, over the protest of the petitioner, conducted a hearing on petitions of the United Mine Workers of America for investigation and certification of representatives. The question was and is presented as to whether the Secretary of the Interior was a necessary and indispensable party to that proceeding. This petitioner contended that because of the war situation, the crisis in the coal industry and the action of the Commander-in-Chief of our armed forces in taking charge of these operations in time of war, the Secretary of the Interior was an indispensable party. This position was disallowed by the Board and the Court below.

2. Because of the emphatic statements in an Executive Order by the Commander-in-Chief, the importance of the production of coal and the vigorous and effective action of the United Mine Workers of America, the real party in interest, against the inter-

ests of the Government in a time of war, it was and is contended that this was an adversary proceeding. The National Labor Relations Board and the Court held, in substance, that it was a preliminary and non-adversary proceeding.

3. At the first hearing on November 5, 1943, this petitioner appeared specially and introduced no evidence. At a hearing on an unfair labor practice charge in April, 1944, following an *ex parte* election conducted by the National Labor Relations Board, this petitioner attempted to introduce evidence as to what constituted an appropriate unit among its production and maintenance employees.

It contended:

(a) That its failure to introduce evidence at the first hearing was proper and in good faith, and

(b) That the evidence was material and that the National Labor Relations Board should have received it in order to reach a correct conclusion. The Board held that by reason of its failure to present evidence at the hearing on November 15, 1943, this petitioner was estopped to introduce it later. This petitioner contends that a technical rule of estoppel has no place in an allegedly non-adversary proceeding. Its position was disallowed by the National Labor Relations Board and the Court below.

4. This petitioner contends that the bargaining units were fixed by the National Labor Relations Board arbitrarily and capriciously without the benefit of material evidence which it declined to hear, in disregard

of the facts and of the interests of the employees involved; that this would result and has resulted in a Balkanization of the company's operations, making it impossible for it to operate without violating the National Labor Relations Act.

This petitioner was conducting an integrated coal mining operation with a central executive and administrative staff. It was operating several mines, frequently closing old mines and opening new mechanized mines and transferring men as such changes were made. In such an operation any unit which included less than all of the production and maintenance employees of this petitioner would be obviously inappropriate. As a result of the ruling of the National Labor Relations Board on the unit question, one mine in one unit has voted for the union; one mine in another unit has voted against the union and new mines since opened are not in either or any bargaining unit. The question as to what constitutes an appropriate unit is important in view of similar questions incident to the return of veterans and changes in all types of operations of all types of enterprises incident to reconversion.

5. The Examiner for the National Labor Relations Board expressly reserved the right of the Board to reopen the case. This petitioner had no power to reopen the case under rules of the National Labor Relations Board or otherwise. The question is presented as to whether the Court below erred in finding that this petitioner should have made application to reopen the case before the National Labor Relations Board after possession of its mines was restored to it.

6. The question is presented as to whether the National Labor Relations Board should be required to consider available evidence on the question of what constitutes an appropriate unit for collective bargaining or whether on the other hand it can invoke a technical estoppel, thus excluding evidence in a proceeding designated under the Act as an investigation which should be preliminary and impartial.

STATUTES INVOLVED.

The statutes involved are referred to in the above paragraph on "Jurisdiction."

Authorities are cited in the supporting brief, filed herewith.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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October Term, 1946.

WEST KENTUCKY COAL COMPANY

versus

NATIONAL LABOR RELATIONS BOARD.

On Petition for Writ of Certiorari from the Supreme Court to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE WEST KENTUCKY COAL COMPANY.

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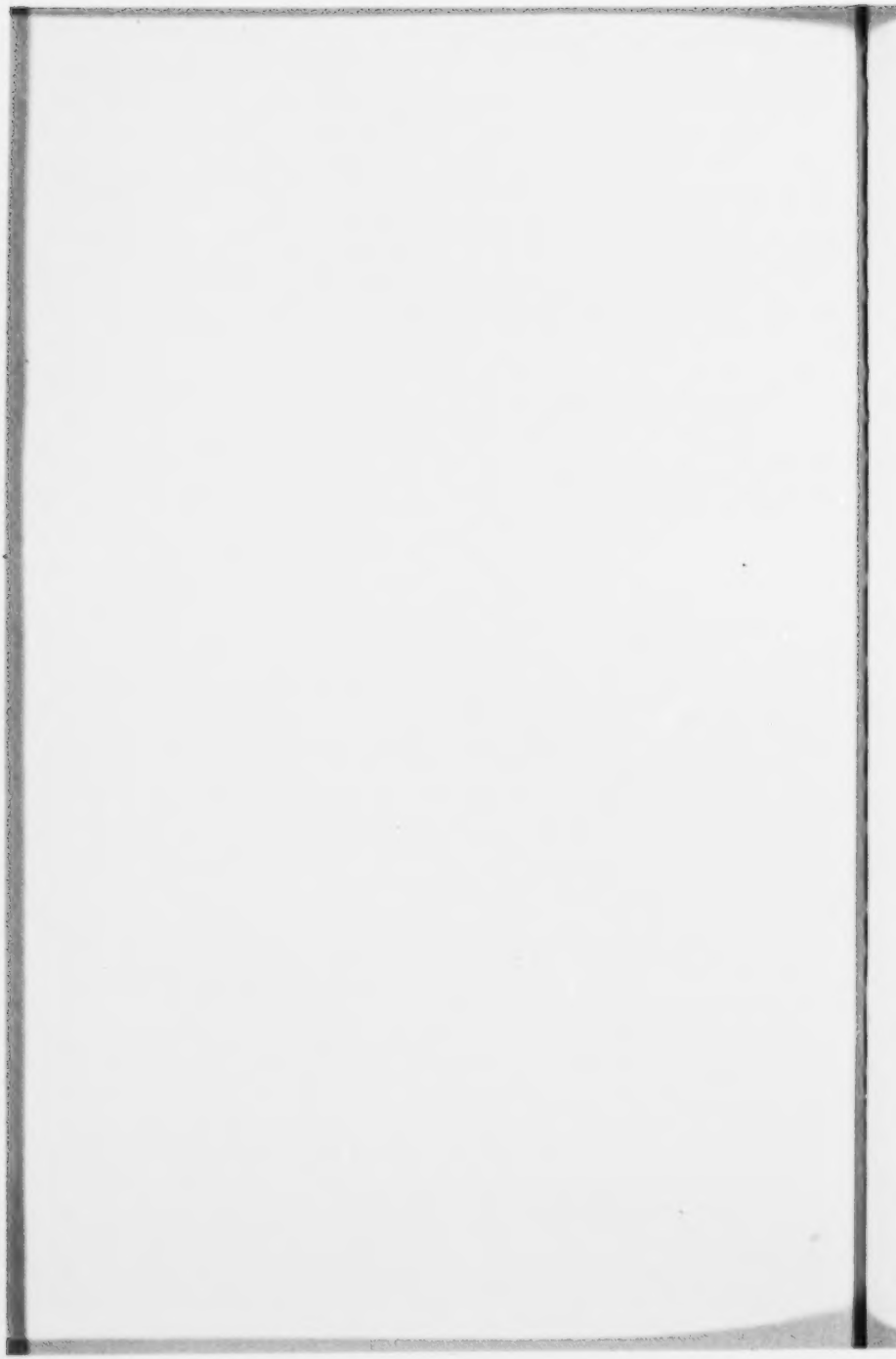

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IN THE

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WEST KENTUCKY COAL COMPANY

v.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The petitioner makes application for review of the final decree of the United States Circuit Court of Appeals for the Sixth Circuit on a petition for enforcement of an order of the National Labor Relations Board. The lower Court sustained a ruling of the National Labor Relations Board made without the benefit of material evidence which the Board refused to hear, to the effect that all of the production and maintenance employees of the respondent coal company did not constitute an appropriate unit for collective bargaining.

The United Mine Workers of America, hereinafter referred to as the union, contended that each one of four (4) mines of the petitioner were appropriate units, disregarding the fact that the company was conducting an integrated operation with a central executive and administrative staff, frequently closing old mines and opening new mechanized mines, transferring men as such changes were made. The Board divided the operation into two (2) units. As a result of this the petitioner's production and maintenance employees in one unit fixed by the Board, have voted against the union; in another unit at an election in which the petitioner did not participate, the union contends that they have voted for the union; a new mine, since opened, is not included in either unit and one mine included in one alleged unit was closed before an election could be held.

The confusion, producing an impossible operating situation, results in part from the action of the Board in conducting a hearing on November 5, 1943, at Madisonville, Kentucky. At this hearing which was held within a few hours after petitioner had first received official notice that the President of the United States had taken over the operation of its mines, the petitioner refused to participate in the proceedings, contending that it had no authority to do so; that the proceeding was against the United States and that the Secretary of the Interior, who had been designated by the President to operate the coal mines, was a necessary party. After overruling petitioner's motion that the hearing be continued the Board proceeded *ex parte*. It disre-

garded petitioner's contention that its operations must be in one unit for the purpose of collective bargaining and divided petitioner's operations into two (2) units.

In one of these units it held an election. Because it believed that the proceeding on November the 5th was not legally effective for any purpose the petitioner declined to furnish payrolls or checkers or to participate in the so-called election. After the *ex parte* election which the Board conducted it certified that the union had a majority in this unit. In accordance with the plans of the petitioner to modernize, integrate and unify its coal mining operations, the mine constituting the other unit had been closed and no election was held in it.

In April, 1944, a hearing was held on an unfair labor practice charge, resulting from the refusal of the petitioner to bargain with the representative certified by the Board as a result of this election. At that hearing in April, 1944, on the unfair labor practice charge, petitioner attempted to introduce evidence as to what constituted an appropriate unit for collective bargaining among its production and maintenance employees. Such evidence was in part available in November, 1943, when the first hearing was held. It was not offered by petitioner at the first hearing because it was not authorized to proceed and would not proceed in the absence of a necessary and indispensable party, namely, the Secretary of the Interior. When it appeared to the Examiner conducting the unfair labor practice hearing in April, 1944, that the evidence as to what constituted an appropriate unit among petition-

er's employees had been available at the hearing on November 5, 1943, the Examiner held that petitioner was estopped to introduce such evidence because of its failure to introduce it at the former hearing.

In August, 1944, the Board conducted another hearing, as a result of which it designated as an appropriate unit another mine of the petitioner which had not been included in either of the other units formerly designated by it. At this hearing, conducted in August, 1944, the Board refused to open or reconsider its ruling at the first hearing in November, 1943, or its ruling at the unfair labor practice hearing in April, 1944. It designated another unit as requested by the union and conducted an election in the unit which the union lost. In that proceeding in August, 1944, petitioner for the first time was permitted to introduce evidence as to what constituted an appropriate unit.

Proceedings at the hearing conducted in August, 1944, were printed in a separate volume at the insistence of the Board. They appear in Volume II of the transcript. These proceedings should really be considered as one in which the evidence for the petitioner was not introduced until the hearing was held in August, 1944.

In June, 1941, when the company was operating four (4) mines, the company and the union had agreed that the production and maintenance employees in all of these mines constituted an appropriate unit for collective bargaining. An election was held in which all these employees voted. Another election was held November 26, 1941. Between the first and second elections

the company had opened two (2) additional mines and by agreement employees at all of these mines voted. Between the dates of those elections in 1941, which the union lost, and the date when these proceedings began, the company had opened two new mines and closed two (2) older mines. All of these changes were part of a plan to mechanize and integrate the operations. The older hand operations were worked out and discontinued. As a result, production was greatly increased at a time when the Government was insisting upon the importance of such an increase in production. These changes involved extensive transfers of men. The operation of the Selective Service Act made many changes necessary. Between January and July, inclusive, 1944, two hundred and thirty-seven (237) men were transferred, usually from closed mines to new mines.

ARGUMENT.

I.

A. A Hearing on a Petition for Certification of Representatives in Mines Operated by the United States in Time of War, Is a Proceeding in Which the Government Is Interested and in Which It Is a Necessary Party.

"No principle is better established than that the United States may not be sued in the courts of this Country without its consent." *Louisiana* v. *McAdoo, Secretary of the Treasury,* 234 U. S. 627, 58 Law Ed. 1506.

"If the interest of the United States is *substantially* affected the suit cannot be maintained, since the United States cannot be made a party to such a suit without its consent. United States, *Ex. Rel.* Goldbert v. Daniels, 231 U. S. 219, 34 S. Ct. 84, 58 Law Ed. 191. The determinative factor is the effect of the judgment." *Transcontinental and Western Air, Inc.*, v. *Farley*, 71 Fed. 2d 288.

In Executive Order No. 9393, 8 Federal Register, 14877, dated November 1, 1943, the President of the United States by executive order stressed the vital necessity of continuing the production of coal and authorized the Secretary of the Interior to take immediate possession of all mines producing coal in which a strike or stoppage had occurred or was threatened" . . . together with any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal." Elsewhere in the Executive Order, the President committed to the Secretary of the Interior wide power and authority which in effect gave to the Secretary of the Interior full control over all employee relations. Theoretically, at least, the Government became the employer and the Wagner Act was not applicable in a strict sense to the Government. Certainly the "rights" given by the Wagner Act were reduced to privileges to be extended in the discretion

of the President and the Administrator appointed by him.

Petitioner received official notice of this action immediately before the hearing on November 5, 1943. The Secretary of the Interior was then operating its mines through an Operating Manager appointed by him. Our position is that the interest of the United States was directly and substantially affected by this proceeding. It had in its possession all of the property involved. It had assumed the duty of managing and operating the property, and the certification of representatives would directly and immediately affect the operation and management.

The difficulties incident to this problem could not be better illustrated than by reading the Executive Order above referred to. Because of these difficulties the President of the United States had found it necessary, for the effective prosecution of the war, that coal mines be taken over by the Government of the United States, in order to protect the interest of the Nation, and the rights of the workers to continue at work. Employees of this company were continuing at work.

If the union had been their recognized and certified bargaining agent, they would not have been at work.

We can think of no proceeding involving a comparable amount of property or a comparable number of employees which would more immediately, directly or substantially affect the interest of the Government, which was then operating these properties. Because of this interest, and because there was no right or permission to proceed, these cases should have been abated

until the Secretary of the Interior had been made a party or until a reasonable time after these mines had been restored to their owners.

B. An Indispensable Party Was Not Before the Board.

If the interest of the United States is directly and substantially affected, it becomes a real party in interest. Any action taken in this proceeding necessarily affected and involved the operations conducted by the Secretary of the Interior through his operating manager.

> "Even though the United States is not joined as a formal party defendant, if its interest is so directly involved that it is a real party in interest, and any relief that might be given in such a suit will operate against the Sovereign, it is an indispensable party and a suit cannot be maintained. *Morrison* v. *Work,* 266 U. S. 481, 45 S. Ct. 149, 69 Law Ed. 394; *Wells* v. *Roper,* 246 U. S. 335, 38 S. Ct. 317, 62 Law Ed. 755; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 24 S. Ct. 820, 48 Law Ed. 1134; *Belknap* v. *Schild,* 161 U. S. 10, 16 S. Ct. 443, 40 Law Ed. 599." *Transcontinental & Western Air* v. *Farley,* 71 Fed. 2d 288.

It is a well-established rule of law that if an indispensable party is not joined, the suit must be dismissed. *Gnerich* v. *Rutter,* 265 U. S. 388, 44 S. Ct. 532, 68 Law Ed. 1068; *Webster* v. *Fall,* 266 U. S. 507, 45 S. Ct. 148, 69 Law Ed. 411.

In the last case cited an adult member of the Osage tribe of Indians brought suit against the Superintendent of the Osage Agency, a special disbursing agent, charged with the duty of paying and disbursing funds due Osage Indians, and the Secretary of the Interior, seeking a mandatory injunction. There was no service on the Secretary of the Interior, and he did not appear. The other defendants were served, and the case went to trial. The Supreme Court stated that the suit was one which required the presence of the Secretary of the Interior and the bill should have been dismissed for want of a necessary party.

The Secretary of the Interior was a necessary party. The mines were in his possession.

In the case of *Wells* v. *Roper,* 62 Law Ed. 755, a suit was filed to enjoin the First Assistant Postmaster General from annulling a contract with the plaintiff to furnish automobiles for the collection and delivery of mail in the city of Washington. The Supreme Court said:

> "That the interests of the government are so directly involved as to make the United States a necessary party, and therefore to be considered as in effect a party, although not named in the bill, is entirely plain."

C. The Rule Is Applicable to the National Labor Relations Board.

Innumerable other cases could be cited, in support of the rule that the Government may not be sued without its consent, and that this consent can only be given by Act of Congress. *Morrison* v. *Work,* 69 Law

Ed. 394; *Ickes* v. *Fox,* 81 Law Ed. 525. If the rule applies to a suit, *a fortiori* it applies to a proceeding before the National Labor Relations Board, itself a creature of the same Government, which is being proceeded against before it.

There is nothing in the National Labor Relations Act which gives the Board authority to deny to the Government the sovereign rights which it enjoys in constitutional courts.

The immunity which is an incident to sovereignty applies in proceedings before the tribunals organized and created in accordance with the Constitution and Acts of Congress, passed under its authority.

No power has been granted to the National Labor Relations Board which would enable it to nullify or disregard this established rule which is binding on all courts.

No reason has been suggested to us, and we believe none can be advanced, in support of the proposition that the proceedings of the National Labor Relations Board are exempt from the rule of immunity which is attached to the sovereign power which created it.

D. The War Labor Disputes Act.

In Executive Order No. 9393 the President stated that he acted "by virtue of the authority vested in me by the Constitution and laws of the United States, *particularly the War Labor Disputes Act* (Public Law 89, 78th Congress, as President of the United States and Commander-in-Chief of the Army and Navy . . ."

Since he was acting under authority of the War Labor Disputes Act its provisions are clearly applicable. Section 4 of the Act is as follows:

> "Except as provided in Section 5 hereof, in any case in which possession of any plant, mine or facility has been or shall be hereafter taken, under the authority granted by Section 9 of the Selective Training and Service Act of 1940, as amended, such plant, mine or facility, while so possessed, shall be operated under the terms and conditions of employment which were in effect at the time possession of such plant, mine or facility was so taken."

Section 5 above referred to provides for an application to the National War Labor Board for a change in wages or other terms and conditions of employment. Obviously this is the only exception. *Expressio unius, exclusio alterius.* The Secretary of the Interior subsequently proceeded under Section 5. In no other way or manner could he vary or change "the terms and conditions of employment." The prosecution of any other legal or administrative proceeding looking to such a change was a violation of the War Labor Disputes Act.

In taking over the property, management and operation of West Kentucky Coal Company, the President and the Secretary of the Interior acted under the authority of the War Labor Disputes Act. *There is no provision in that Act* for a suit against the United States. In the absence of such a provision no suit can be maintained.

After the President of the United States took over the control and operation of the railroads during World War No. 1, it was held that a suit against the Presidential Agent was a suit against the United States, and could not be maintained without express permission. *Davis, Agent, etc.*, v. *Dye*, 215 Ky. 216, 284 S. W. 1049.

In order to maintain actions at law or suits in equity against the Director General, it was necessary to write into the Acts of Congress provisions expressly authorizing such proceedings. (See Act of March 21, 1918, 40 Statutes at Large, 456, Dh. 25, Sec. 10; Compiled Statutes, Secs. 3115 and ¾ j. See also 4 A. L. R. 1680.)

We have pointed out above that the President could not, by Executive Order, give such consent. This could be done only by Act of Congress. *Morrison* v. *Work*, 69 Law Ed. 394; *Ickes* v. *Fox*, 81 Law Ed. 525.

Any proceeding against the United States must be clearly within the terms of the statute governing the right to sue. *United States* v. *Michel*, 75 Law Ed. 598. Such statutes will be strictly construed.

E. The Right of Collective Bargaining.

The Court below assumed apparently that petitioner contended that the War Labor Disputes Act suspended the right of collective bargaining and that the position of the petitioner would deny the right of collective bargaining. Petitioner has consistently maintained that this right should be extended to all of its production and maintenance employees in all of its mines and that they should all be permitted to vote

at one election in a unit which comprises them all. A condition precedent to the legal exercise of the right of collective bargaining is the determination by agreement or in some other manner, of what constitutes an appropriate unit for collective bargaining. There has been no fair or legally effective ruling on the unit question. It is the ruling of the Board without the benefit of material evidence which would prevent the exercise of the right of collective bargaining.

F. The Coal Crisis.

The United States was at war. It seized the mines to enable it to prosecute the war and to prevent the union from stopping essential war activity. To say that the United States had no interest in a proceeding to bring other producing mines under the control of the same labor organization which caused this crisis, is unsound. We ask the Court to strip the proceeding of deceptive fictions and accept it for what it was. It was an effort to subject the mines of petitioner to the same work stoppage which had upset the production of coal for war industries so many times before and since that hearing. The mines of petitioner had never been subject to such work stoppages. Its was a good war record of steadily increased production. The United States was interested in that production. The President said in his executive order (Tr., p. 91) that "widespread stoppages have occurred."

> "Whereas widespread stoppages have occurred in the coal industry and strikes are threatened

which will obstruct the effective prosecution of the war by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines; and

"Whereas it has become necessary for the effective prosecution of the war that the coal mines in which stoppages or strikes have occurred, or are threatened, be taken over by the Government of the United States in order to protect the interests of the nation at war and the rights of workers to continue at work."

Pursuant to this executive order the Secretary issued his specific order (Tr., p. 87) to Mr. Love, designating him "Operating Manager for the United States," and taking possession of the West Kentucky Coal Company's mines, directing him to fly the national flag of the United States on the mining premises and to operate the mines in accordance with Regulations theretofore promulgated, posting notice of possession as supplied.

Nothing should have been permitted to interfere with production of an essential commodity which called for such emphatic statements from the Commander-in-Chief. The plan urged upon the Board by the union and approved by the Board, of separating the operations of the company into several units, would interfere with the continued production of a vital war product. "Further the Court takes judicial notice that the war emergency requires everything to be done to maintain a high rate of coal production and nothing to be permitted to interfere therewith." *Rocky Mountain Fuel*

Co., U. S. D. C., Colorado, August 5, 1944, No. 12127, 7 W. H. R. 877.

It is impossible to reconcile these facts with the holding that this was a preliminary and non-adversary proceeding.

II.

The Rejection of Petitioner's Evidence as to an Appropriate Unit.

We have pointed out above that these proceedings involved a sharp issue. The issue was squarely presented in the representation cases. In the Unfair Labor Practice case 14-C-922, the parties understood that the proceedings were a step in the process necessary to procure a consideration by the Court below of the legal questions involved in the first representation cases. In reality this Unfair Labor Practice case was the least "adversary" of the proceedings set out in this record. As indicated above the Government took formal possession of petitioner's mines early in November, giving them official notice on the date of the hearing, November 5th. It relinquished this possession on November 17, 1943. At the hearing in the Unfair Labor Practice case, April 17, 1944, based upon petitioner's refusal to bargain, petitioner desired to place in the record, in proper form, material facts relative to an appropriate unit. These facts should have been of interest to the Board regardless of the manner of their presentation. The union was represented by counsel, the petitioner was represented by counsel. The interest of the ma-

jority of all of the employees of the petitioner should have been represented by some one and we submit that it is the duty of the Board not to act solely in the interest of those who wished to become members of a national union, but to consider the rights and wishes of all of the employees involved. If the Board had been interested in safeguarding the rights of all of the employees, it would have welcomed evidence to aid it in reaching a fair and proper conclusion on a disputed question. The Board, however, refused to permit the petitioner to introduce evidence. It applied the principle of estoppel. It took the position that the petitioner should have to practice the case as the Board wanted it to practice it; that it should have introduced this evidence at the first hearing in the representation cases. At the hearing on November 5, 1943, the Examiner attempted to induce the petitioner to present evidence, stating that it could do so without prejudice to its contention as to the invalidity of its proceeding. The attorneys for the petitioner were of the opinion that the Examiner did not have authority to invite them to represent the Secretary of the Interior or to act in the proceeding in any capacity. For that reason, respondent declined to participate in the hearing. Though the evidence as to the appropriateness of the unit was offered for the first time at the hearing in the Unfair Labor Practice case 14-C-922 the Examiner declined to admit it. In sustaining him the Board said, "In the interest of orderly procedure, it follows that the respondent cannot now be given a second opportunity

to prove what it refused to prove at its earlier opportunity."

In effect this imposes upon the company an estoppel certainly not equitable, but highly technical. If the ruling was sound, we would be required to practice a case exactly as the Examiner and Board suggest; otherwise we would act at our peril. This is more technical than any court rules with which we are familiar, current or obsolete. The ruling was not only legally erroneous, but it disregarded the letter and spirit of the National Labor Relations Act, which give primary consideration to the wishes of a majority of the employees in an appropriate unit.

As stated by the Supreme Court in the case of *Pittsburgh Plate Glass Company* v. *National Labor Relations Board,* 313 U. S. 146, 85 Law Ed. 1251, "the unit proceeding and this complaint on unfair labor practices are really one." The ruling of the Board as to the unit was not subject to direct review under the statute. It was subject to review only after a complaint charging an unfair labor practice, predicated upon the ruling as to the unit.

Under Section 9 (c) of the Act (29 U. S. C. A., Sec. 159-C) the Board is free to hold an election or to utilize other suitable methods for determining the bargaining representative in an appropriate unit. It could have a hearing prior to an election or it could have a hearing after an election. The demands of due process of law do not require a hearing at any particular stage, but they do require a fair hearing at some stage. *Inland Empire District Council Lumber*

and Sawmill Workers Union, Lewiston, Idaho, Petitioners, v. *Harry A. Mills,* 89 Law Ed. 1233, decided June 11, 1945.

There could not be a fair hearing unless the evidence of the petitioner was introduced. Certainly the refusal of the petitioner to introduce this evidence at the hearing November 5th was in good faith.

It appears to us that the rejection was arbitrary and in disregard of the duty of the Board to complete its investigation and obtain all the pertinent facts so that it might reach a fair conclusion as to what constituted an appropriate unit. The Board's argument that the representation cases are investigations and not adversary proceedings is most inconsistent with its position in enforcing an estoppel against the petitioner on account of the manner in which it handled its case at the hearing on November 5th.

In this section of our brief it is not our purpose to intimate *arguendo* that the position taken by petitioner on November 5, 1943, was incorrect. We think it was sound. Certainly it was in good faith, as conceded by counsel, for the Board in argument before the Court below. If it had been doubtful, however, the paramount interest of the Board in discharging its duty to determine what was an appropriate unit, should have impelled it to hear the evidence rather than to exclude it. We respectfully insist that the Court below erred in putting the seal of its approval on a finding made as the result of an *ex parte* hearing without the benefit of available material evidence.

III.

Any Bargaining Unit Comprising Less Than All of the Production and Maintenance Employees of Petitioner Would Be Inappropriate.

The Board attempted to defend its ruling, separating the employees of this company into more than one unit, upon the grounds that there is a geographical separation of its mines in Hopkins County from the mines in the adjoining counties. This is the sole ground on which its ruling could be justified. Petitioner contends that this does not amount to substantial evidence when considered in the light of all the facts, which were finally placed in the record after the Board had made its erroneous ruling. The geographical separation is of no consequence under modern transportation conditions. A further ground relied upon is the statement of a witness in the *ex parte* hearing on November 5th, in response to one of a long series of leading questions, that there had been no transfer of men from the Sturgis mines to the Earlington mines in the past two (2) or three (3) years. The facts as to these transfers are shown in the testimony of witnesses for the petitioner in Case No. 14-R-988. We have pointed out in our Statement that two hundred and thirty-seven (237) men were transferred in the first six (6) months of 1944. One hundred and sixteen (116) were transferred from the Union County mines and from Mine No. 10 (Webster County) to the Hopkins County or Earlington mines. Transfers and changes were continuous. In August, 1943, the company employed one

thousand, one hundred and seventy-four (1,174) men in its mines. In August, 1944, it employed eight hundred and eighty (880) men. The mechanization had progressed, production had increased, but the force of maintenance and production employees had been reduced by two hundred and ninety-four (294). (See testimony of Davis Read, Tr., Vol. II, p. 228.)

The transfers occasioned by the closing of the two (2) mines which were closed while these proceedings were pending had not been completed at the time of the last hearing (Tr., Vol. II, p. 235). Transfers were usually on a permanent basis, but the witnesses were not able to suggest any period as a representative period as to the rate of interchange of men from one mine to another (Tr., Vol. II, p. 236). The shift and interchange of employees from one mine to another had grown progressively each year (Tr., Vol. II, p. 237). The interchange of men between mines had been going on throughout the years of operation. It was not traceable solely to the closing of mines, but it had increased. In some cases men made the entire circle of the company's mines and ended up where they started. (See testimony of Lander Chisholm, Tr., Vol. II, p. 246.) The witnesses were able to state that the interchange did continue. Apparently, practically all transfers were made at the request of the men (Tr., Vol. II, p. 248). A large amount of Union and Webster County employees came to Hopkins County (Tr., Vol. II, p. 250). The reason for the transfers was stated in Company Exhibit No. 2 (Tr., Vol. II, p. 315) as follows:

> "When extending territory, opening new entries, replacing employes lost to Armed Service, introducing new machinery, etc., men are transferred from one mine to another. Illustrations; Loading machine helpers and cutting machine helpers transferred as loading machine operators and cutting machine operators. In changing from three 7 hour shifts to two 8 hour shifts at one mine, resulting available men transferred to mine going on two shift per day basis."

Supplies, equipment and parts purchased for us in the mines were interchangeable among the mines. (See testimony of W. S. Williams, Tr., Vol. II, p. 260.) Though the company had four (4) supply houses, any of the mines could call on any of the supply houses for a repair part or any material needed (Tr., Vol. II, p. 262). A machine shop at Sturgis served all four (4) mines and all of the mines have some work done in the Earlington shop. There is some armature work done at the Earlington shop which is not done at the Sturgis shop. In the case of *Jordan Marsh Company* v. *Labor Relations Commission,* decided September 13, 1944, by the Massachusetts Judicial Supreme Court (15 L. R. R. 188), the Court considered a finding and order of the Massachusetts Labor Relations Commission, designating as appropriate bargaining units for a large retail store, a department of forty (40) employees who sold men's clothing as Unit "A" and a department of twenty-one (21) employees who sold furniture and bedding as Unit "B." These units comprised only part of a large number of employees of the store. Commenting on the evidence, the Court said:

> "At the hearing before the Commission nearly all the evidence tending to show the employment conditions and the relations of the members of the sales force to the company and to each other was introduced through obviously intelligent witnesses whose positions in the company were such that they should be familiar with the subjects of their testimony, and they testified clearly, without equivocation, and in precise detail. Their evidence was not contradicted or challenged in any way, either before the Commission or in the argument before us."

The language of the Massachusetts Court could have been applied without change to the evidence introduced by the petitioner in Case No. 14-R-988. We quote from the syllabus of the Massachusetts case:

> "Selection of bargaining units is to promote industrial peace and, as such, must be adapted to manner in which industry operates; stress must be laid on securing groups of employees who have common interests in more important matters which are likely to become subjects of collective bargaining; reasonable consideration must be given also to desires of employees and practical possibility of securing adequate representation for proposed units without unreasonable delay. By these standards, establishment of units of men's clothing salesmen and furniture salesmen in retail department store in which salespeople are frequently moved from one department to another, all employees are hired and fired by central personnel department, and services of company's health and welfare departments are open to all salespeople

alike is not reasonable since only interests in collective bargaining which are shared in common by members of proposed units and not by other members of sales force are such, if any, as may arise from sales of particular merchandise as distinguished from other merchandise; further bargaining interests peculiar to members of these groups seem trivial in comparison with interests shared in common with all other employees."

The testimony of all of the witnesses for the company in Case No. 14-R-988, shows a progressive integration of the company's production operations. The company maintains one central executive office at Earlington. There are located its president, vice president, sales manager, general superintendent, safety engineer, construction engineer and chief electrician. As indicated above, many employees are moved and transferred from time to time. Certain types of maintenance employees work on all of the mines.

The position of the petitioner is that the ruling of the Board as to the unit is not supported by any substantial evidence; that the evidence which was finally placed in the record in Case No. 14-R-988 shows conclusively that the four (4) mines of the company are an integrated, uniform operation, which could not properly be divided into more than one unit for the purpose of collective bargaining. In an industry in which large units have been deemed appropriate it would require some convincing reason to satisfy a fair tribunal that the operation of this company should be divided into more than one unit.

IV.

Failure to Reopen Case Before the Board.

The first hearing referred to above was held November 5, 1943. On November 17, 1943, petitioner was permitted to resume possession and operation of its mines. The Court below commented on the time during which petitioner was in possession of its properties before the unfair labor practice hearing, April 17, 1944. The Court states: "During that time it failed to apply to reopen the case or to be allowed to present the factual side of its contentions in any manner." We do not understand that we had that privilege. There is nothing in the rules of the Board authorizing such a practice. The Examiner had ordered the hearing closed subject to be reopened by the Board, not by the petitioner. We had no reason to think we could reopen the case. If we had attempted to do so we feel sure the Board would have ruled that we were estopped.

The important thing was to designate an appropriate unit. This should have overshadowed procedural matters. The Examiner admitted he was proceeding under a handicap (Tr., p. 128). He made it possible for the Board, but not for the petitioner, to remedy that. We quote the concluding order of the Examiner:

> "The Examiner chose to proceed with the hearing nevertheless with the thought in mind that despite that handicap a sufficiently complete record could be made. Since there is a possibility that the Board may disagree on this point, and since also

the rules and regulations of the Board require me to refer to the Board rulings on the company's motions to dismiss, I am closing the hearing at this time with a reservation and the right in the Board to reopen the hearing for further evidence in the event the Board deems such action advisable, and with, of course, the right to rule on the motion to dismiss. I would assume the Board would have such rights in any event, but I make such reservations specifically so that there may be no question about the matter. With that statement, therefore, and that reservation, the hearing is closed."

(At 3:30 o'clock p. m., Friday, November 5, 1943, the hearing in the above-entitled matter was closed.)

The Board knew that possession of its mines had been restored to the petitioner. It had the right to reopen the case, and if it had desired to obtain full information, and to have all of the material evidence on the unit question, it would have done so.

We submit that we could not have reopened the case and had no reason to believe that an effort to do so would be given consideration.

CONCLUSION.

It is important that the National Labor Relations Board should not be permitted to act arbitrarily and capriciously in the discharge of its duty to determine what constitutes an appropriate unit for collective bargaining. Many necessary changes in all industries incident to the return of veterans and the readjustment

of production in the face of the problems of reconversion, make the unit question an important one. The position taken by the Board and sustained by the Court below, that the determination of an appropriate unit is a preliminary and non-adversary investigation is entirely irreconcilable and inconsistent with the technical rulings against the position of the petitioner. The effect of these rulings is to preclude the possibility of a fair consideration of what constitutes an appropriate unit.

The Court below held that the evidence which the Board refused to consider was material. It said: "Clearly this evidence is material, for it bears upon the organization and operation of the mines, the exchange of employees among the various mines, and contains other information which bears upon the propriety of union representation of individual mines, of groups of mines, or of all of respondent's mines treated as one unit." If the Board were interested in doing its duty in the premises, it should be eager to receive and consider such evidence, not for the benefit of the petitioner or even of the union, but for the benefit of all of the employees of the petitioner who are the real parties in interest and whose rights are disregarded by failure to consider all available material evidence.

This proceeding grows out of the action of an agency of the United States, namely, the National Labor Relations Board, in a national crisis. The Board chose to ignore the crisis and to proceed as though its operations were completely insulated from national and international questions, legal or economic. The

crisis is recurrent and in different form it will arise again. We submit that the action of such an active agency under the circumstances and facts of this case, is of sufficient importance to demand consideration by this Court.

Respectfully submitted,

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JUN 3 1946
CHARLES ELMORE CROPLEY
CLERK

No. 1195

In the Supreme Court of the United States

OCTOBER TERM, 1945

WEST KENTUCKY COAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (R. 324–331) is reported in 152 F. (2d) 198. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 66–75) are reported in 57 N. L. R. B. 89. The decision of the Board in a prior representation proceeding which forms part of the record in this case (R. 168-175) is reported in 54 N. L. R. B. 358.

JURISDICTION

The decree of the court below (R. 323) was entered on December 6, 1945. The petition for

rehearing (R. 333–341) was denied on February 11, 1946 (R. 343). The petition for a writ of certiorari was filed on May 3, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, after objection by the petitioner, the National Labor Relations Board could properly conduct a hearing, under Section 9 of the National Labor Relations Act, without making the Secretary of the Interior a party to its proceedings, when the employees involved worked in certain of petitioner's mines which, at the time of the hearing, were temporarily in the possession of the Secretary of the Interior pursuant to his seizure thereof under the provisions of the War Labor Disputes Act.

2. Whether petitioner was entitled to a second opportunity, in a subsequent unfair labor practice proceeding before the Board, to adduce evidence available to it at the time of the prior representation hearing which it refused then to adduce because of its contention based upon the seizure of the mines and which it failed to ask the Board to receive by reopening the record when the mines were restored to its possession two weeks after the hearing.

3. Whether the Board acted arbitrarily in determining that the employees in three of petitioner's mines which were located in the same vicinity and were geographically separated from petitioner's other mines constituted an appropriate bargaining unit.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in Appendix A, *infra,* pp. 22–26. The pertinent provisions of the War Labor Disputes Act (Act of June 25, 1943, c. 144, 57 Stat. 163, 50 U. S. C. App. (Supp. IV) 1501, *et seq.*) are set forth in Appendix B, *infra,* pp. 27–30. The pertinent provisions of the Regulations and Order 1888 of the Secretary of the Interior (8 F. R. 6655, 10712, 11344, and 8 F. R. 15199) are set forth in Appendix C, *infra,* pp. 31–37. The pertinent provisions of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended (8 F. R. 16047, 9 F. R. 7745) are set forth in Appendix D, *infra,* pp. 38–39.

STATEMENT

The United Mine Workers of America, District No. 23 (hereinafter referred to as the Union), having filed petitions, under Section 9 of the Act, for investigation and certification as the bargaining representative of the employees of

several of petitioner's mines, the Board commenced an investigation and as part thereof held a hearing on November 5, 1943 (R. 79). Petitioner appeared specially at the hearing and asserted that possession of its mines had been taken by the United States,[1] that it was not authorized to take part in the proceedings, and that the Board was without authority to proceed therewith (R. 80, 83–97). Petitioner accordingly moved that the Union's petitions be dismissed or, in the alternative, that the hearing be continued until the Government relinquished its custody and control of petitioner's mining properties (R. 10–40). The trial examiner suggested that petitioner proceed with the presentation of its case, without prejudice to its contention based on the seizure of its mines (R. 103). Petitioner declined to do so (*ibid.*). Thereupon the trial examiner denied the motion for continuance, and reserved for the Board decision on petitioner's motion to dismiss (R. 102). Petitioner then withdrew from further participation in the hearing (R. 104). Petitioner's mines were restored to its possession on November 17, 1943.[2]

[1] Pursuant to Executive Order No. 9393, dated November 1, 1943 (R. 91–93; 8 F. R. 14877), the Secretary of the Interior, by Order 1888, dated November 1, 1943 (8 F. R. 15199), took possession of the nation's bituminous coal mines, including petitioner's, and designated the president of each coal mining company the operating manager for the United States.

[2] Petitioner so stated in its brief in the court below and the court commented on the fact in its opinion (R. 328).

The Board, on January 6, 1944, issued its decision and direction of election (R. 168–175), in which it denied petitioner's motion to dismiss, affirmed the trial examiner's ruling denying petitioner's motion for a continuance (R. 169), and determined that petitioner's production and maintenance employees working in North Diamond Mine No. 2, North Diamond Mine No. 3, and Hecla Mine, with certain exclusions, constituted a unit appropriate for the purposes of collective bargaining with the petitioner, within the meaning of Section 9 (b) of the Act (R. 173).[3] The facts respecting the appropriate unit, as found by the Board and shown by the evidence, may be summarized as follows:[4]

North Diamond Mine No. 2, North Diamond Mine No. 3 and Hecla Mine are all located in the immediate vicinity of Earlington, Kentucky, and are approximately 45 miles away from petitioner's other mines in the general neighborhood of Sturgis, Kentucky (R. 172–173; 110–112). The employees in petitioner's Sturgis mines, with the exception of Mine No. 2, have shown comparatively little desire for collective bargaining (R.

[3] In its decision, the Board also determined that petitioner's production and maintenance employees at Mine No. 2, near Sturgis, Kentucky, constituted a separate appropriate bargaining unit (R. 173–174). This mine was subsequently closed and no election was ever held.

[4] References preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

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173; 115). A great majority of the workers in the three mines live in the town of Earlington (R. 172–173; 114). The three Earlington mines are all under the supervision of the same superintendent and assistant superintendent, while petitioner's other mines near Sturgis each have a separate superintendent (R. 172–173; 116). The three Earlington mines are machine-loading mines while Mine No. 2, which the Board held constituted a separate appropriate bargaining unit, is a hand-loading mine (R. 172; 125).

On January 25, 1944, the Board conducted an election among the employees in the above described unit which the Union won, and on February 11, 1944, the Board certified the Union as the statutory bargaining representative of the employees in said unit (R. 176–178).

After the issuance of the certification, the Union, by letter dated February 14, 1944, requested petitioner to meet with it for the purposes of collective bargaining (R. 179). Petitioner, by letter dated February 18, 1944, declined, claiming that the Board's certification was invalid (R. 180). Thereafter, the Board, upon charges filed by the Union, issued its complaint alleging, insofar as is material here, that petitioner had refused to bargain collectively with the Union, in violation of Section 8 (5) and (1) of the Act, and held a hearing on the issues raised by the complaint on April 17, 1944 (R. 66–67). At the hearing, petitioner sought to adduce evidence relating to the

issue of the appropriate collective bargaining unit which was admittedly available at the time of the prior representation hearing (R. 144–146). The Board, sustaining the trial examiner's action in this regard (R. 49), refused to permit petitioner to adduce such evidence on the ground that the issue of the appropriate unit had been fully investigated and determined in the prior representation proceeding in which petitioner had been given a full opportunity to participate (R. 67, n. 1, 69–70). Upon the record thus made, and after consideration of briefs and oral argument presented by the parties thereto, the Board issued its decision and order, finding, insofar as is material here, that petitioner had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) of the Act, by refusing to bargain collectively with the Union, upon request (R. 66–75). The Board thereupon issued an order requiring petitioner to cease and desist from its unfair labor practices, upon request, to bargain collectively with the Union, and to post appropriate notices (R. 74–75). After appropriate proceedings, the court below, on December 6, 1945, issued its opinion affirming the Board's findings and order, insofar as is material here (R. 324–331), and, on the same day, entered its decree of enforcement in conformity therewith (R. 323).

ARGUMENT

1. Petitioner contends that the seizure of its mines by the Secretary of the Interior under the War Labor Disputes Act rendered the representation proceeding in question one in which the Secretary of the Interior was an indispensable party, and that since the United States is immune to suit without its consent, the Board was required to discontinue the proceeding during the period of government seizure (Pet. 2–3; Br. 5–15). This contention arises in the case only because the petitioner refused to participate in the representation hearing and the Board did not, in the subsequent unfair labor practice proceeding, permit petitioner to relitigate the appropriate unit issue decided in the representation proceeding. At the time the representation proceeding was instituted (R. 15–16), the Secretary of the Interior had not yet seized the mines. Before the Board issued its decision and direction of election, conducted the election and issued the certification (R. 168–178), the Secretary of the Interior had relinquished the mines to petitioner. The Secretary's possession lasted from November 1, 1943, to November 17, 1943, and happened to coincide with the date the Board had theretofore set for the holding of the representation hearing. Any conceivable interest of the Secretary was present only during this short period. Thus there was no lack of all parties in interest at the time the

representation proceeding was begun and at the time it was decided. At most, the question is whether the Board acted properly in proceeding with its hearing during the time the mines were in the possession of the Secretary of the Interior.

Neither the United States nor the Secretary of the Interior was an indispensable party to the hearings conducted by the Board pursuant to Section 9 of the National Labor Relations Act. As this Court has but recently pointed out, the Section 9 investigation is "essentially informal, not adversary." *Inland Empire District Council* v. *Millis,* 325 U. S. 697, 706. Its purpose is merely to determine whether a majority of the employees in an appropriate bargaining unit have selected bargaining representatives. Surely, with reference to such a proceeding, this Court's comment on unfair labor practice proceedings under Section 10 of the Act, that "there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights", has even more cogency. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 363.

If, as in the *National Licorice* case, employees, who were parties to contracts with their employers, were not indispensable parties in a proceeding which eventuated in an order to the employer to notify the employees that the contracts violated the Act and that the employees were relieved of all obligations thereunder, it would

seem to follow, *a fortiori,* that the Government was not an indispensable party to the Section 9 hearing here involved. At no stage in this proceeding did the Board contemplate the imposition of a duty to bargain upon the United States. When an order to bargain was finally issued by the Board in the unfair labor practice proceeding, it was directed only against the petitioner and its enforcement was of no concern to the Secretary of the Interior. Section 603.5 of the Regulations issued by the Secretary of the Interior (*infra,* p. 32), provides "that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production." Thus, whatever interest the Secretary might have had at the time of the Section 9 hearing was his to assert, and petitioner could not take it upon itself to impute to the Government an interest which it did not have.

The War Labor Disputes Act does not sustain petitioner's further contention (Br. 11) that the seizure of its mines under that Act renders the "prosecution" of the representation proceeding in question "a violation of the War Labor Disputes Act." Sections 4 and 5 of the War Labor Disputes Act (*infra,* pp. 28–29), upon which petitioner relies in support of its contention, merely provide that after an establishment has been seized pursuant to that Act, changes in wages or other terms or conditions in such establishment

can be made only by order of the National War Labor Board upon application of the government agency operating the establishment or upon the request of "a majority of the employees * * * or their representatives." The very language of this provision suffices to persuade the reader that Congress contemplated the designation of a representative of the majority of the employees, and its legislative history indicates that such designation might be made through the processes provided by the National Labor Relations Act.[5] The executive order issued pursuant to the War Labor Disputes Act, dated November 1, 1943 (R. 92; 8 F. R. 14877), as well as the regulations issued by the Secretary of the Interior under the authority of that order, as contemporaneous constructions of the statute "by those charged with the responsibility of getting its machinery in motion," serve further to buttress this conclusion. Cf. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315.

[5] The Senate Report on S. 796, the bill which, as amended, became the War Labor Disputes Act, declares in its analysis of the bill with respect to the rights of employees and employers that "It takes none of their rights away" (Sen. Rep. No. 147, 78th Cong., 1st Sess., p. 1). The debates in Congress (89 Cong. Rec. 3895, 5730, 5732), as typified by the statement of Congressman Thomason, one of the House conferees, to the effect that, "We have not repealed or altered a single word or line in the National Labor Relations Act" (89 Cong. Rec. 5733), demonstrate that Congress, in enacting the War Labor Disputes Act, was on guard against adopting any provisions which would have the effect of curtailing employees' collective bargaining rights under the National Labor Relations Act.

See Sections 603.5, 603.15, 603.16, 603.17, and 603.23 of the Regulations, *infra,* pp. 32–35. The Secretary of the Interior specifically provided, by regulation, that "The mining companies, their personnel and their property are deemed to remain subject during the period of Government control to * * * proceedings of all Federal and State courts and administrative agencies." Section 603.24 (a) of the Regulations, *infra,* p. 35.

2. The Board, upon careful consideration of the matter, gradually evolved the policy which it applied in the decision now before this Court of not permitting an employer, by submitting evidence which was available at the time of a hearing in a prior representation proceeding, to relitigate the issues therein decided in a subsequent unfair labor practice proceeding involving charges of a refusal to bargain with the certified representative. The policy of imposing limitations upon the right of employers to retry, *de novo,* issues previously decided by the Board in representation proceedings was first inaugurated by the Board in *Matter of Pittsburgh Plate Glass Co.,* 15 N. L. R. B. 515, decided September 19, 1939, in which the Board refused to permit the introduction of evidence in the subsequent unfair labor practice case not shown to be "unavailable at, discovered since, or not introduced in, the representation hearing" (15 N. L. R. B., at 518–519). This Court, when the question of the propriety of the Board's action in this regard was before it in *Pittsburgh Plate*

Glass Co. v. *National Labor Relations Board,* 313 U. S. 146, sustained this limitation, although it pointed out that in that case there was no showing made that the evidence sought to be adduced "was more than cumulative". The Court, however, then went on to say, "Nothing more appearing, a single trial of the issue was enough" (313 U. S. at 161–162).

In *Matter of Pacific Greyhound Lines,* 22 N. L. R. B. 111, decided March 29, 1940, the Board again had occasion to state its views concerning the right of employers to relitigate, in subsequent unfair labor practice proceedings, issues previously determined in prior representation proceedings, as follows (22 N. L. R. B. at 124–125):

> While the determinations, findings, conclusions, and certification of the Board in a representation proceeding are not *res judicata* in a subsequent complaint proceeding before the Board under Section 10 (b) and (c), we think it both the intent of the statute and a sound administrative practice that parties in interest to such representation proceeding cannot try and have heard *de novo* in the subsequent complaint proceeding questions or matters adjudicated in the previous proceeding in the absence of cogent showing of possible error in such prior proceeding. * * *
>
> * * * * * *
>
> We think it equally within the statutory intent and sound administrative practice that parties in interest to a representation

> proceeding cannot in a subsequent complaint proceeding require the Board to withhold presumptive effect from its previous determinations, findings, conclusions, and certification, on the ground that the Board in the representation proceeding failed to consider matters or evidence which the parties there could have presented but which they failed to do without apparent reasonable cause. In the instant case the parties had their opportunity to be heard by the Board with regard to such matters in the Representation Proceedings, and the fact that they did not avail themselves thereof does not entitle them as a matter of right to a second opportunity.

The most recent application of this rule was in *Matter of Swift and Company,* 63 N. L. R. B. 718, in which the Board sustained the action of its trial examiner in refusing to permit the employer to adduce evidence on the issue of the appropriate unit which had been previously decided in a representation proceeding (63 N. L. R. B. at 722–723). Compare *Matter of Norfolk Southern Bus Corp.,* 66 N. L. R. B. 1165, decided March 26, 1946.

The policy adhered to by the Board in this case is a salutary one and the only one administratively workable. The whole purpose of representation proceedings is to facilitate collective bargaining and make possible its early commencement by disposing of certain preliminary ques-

tions—such as the appropriate unit and the majority status of the representative claiming to act as the statutory bargaining representative—questions which might prove a threshold obstacle to the bargaining contemplated by the Act. To permit employers to withhold evidence material to these questions at representation hearings for reasons of their own, and thereafter allow them a second opportunity to adduce such evidence in unfair labor practice proceedings would, in many cases, render the representation proceedings wholly meaningless and would set at naught numerous decisions and directions of elections, elections, and certifications. Obviously the Board should not be required to expend either its energies or its funds upon any such futile proceedings. To be required to do so would be the essence of disorderly administration of the Act.

Moreover, to give employers a second opportunity in unfair labor practice proceedings to present evidence on the appropriate unit issue is to invite them to ignore the representation proceedings altogether and to refuse to bargain in the hope that the Board, in the unfair labor practice proceeding, will, upon the basis of the evidence withheld in the representation proceeding, upset its prior unit determination and dismiss the unfair labor practice charges. Manifestly the Board cannot adopt a procedure which is so squarely opposed to the declared policy of the

Act to encourage the practice and procedure of collective bargaining.

Decisions of the circuit courts of appeals fully sanction the action of the Board in this case in denying petitioner "a second opportunity to prove what it refused to prove at its earlier opportunity" (R. 70). Thus in *National Labor Relations Board* v. *Anwelt Shoe Mfg. Co.*, 93 F. (2d) 367 (C. C. A. 1), the employer declined to adduce evidence in its behalf because of its conviction that the Act was unconstitutional. After the Act was held constitutional by the Supreme Court, the employer sought leave of the circuit court of appeals to adduce such evidence. The court denied the petition, holding that there were no reasonable grounds for the failure to adduce the evidence at the hearing before the Board (93 F. (2d) 372).[6] See also *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. (2d) 494 (C. C. A. 3); *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567, 573 (C. C. A. 7); *New Idea, Inc.* v. *National Labor Relations Board*, 117 F. (2d) 517, 525 (C. C. A. 7); *National Labor Relations Board* v. *Algoma Plywood and Veneer Co.*, 121 F. (2d) 602, 604–

[6] In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 25, and *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 123, the employers declined at the hearings before the Board to adduce evidence in their own behalf. The Supreme Court nevertheless sustained the Board's orders without giving the employers a further opportunity to be heard.

605 (C. C. A. 7); *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. (2d) 433, 442 (C. C. A. 5); cf. *Colorado Radio Corp.* v. *Federal Communications Commission*, 118 F. (2d) 24, 26 (App. D. C.).

A further consideration buttresses the decision of the court below. After the short period of Government possession was terminated, petitioner made no effort to have the Board reopen the representation hearing in order to present the evidence which it refused to adduce because of its contention based on the seizure of its mines. Sections 8 and 9 of Article III of the Board's Rules and Regulations, Series 3, as amended (*infra*, pp. 38–39), provide that the Board, after the hearing in a representation proceeding has been held and the Regional Director has transmitted the record to the Board at Washington, shall "proceed, either forthwith upon the record, or after oral argument or the submission of briefs, *or after further hearing*," to direct a secret ballot of the employees, or to certify the representatives designated, or to make other disposition of the matter. [Italics added.] In view of this provision for further hearing, reasonable diligence on petitioner's part, as the court below in effect held (R. 328), required that it apply to the Board to reopen the hearing after the mines were restored to its possession. Petitioner's failure to request such relief of the Board precludes any

claim of prejudice based upon the Boa
to receive the evidence in question.

3. Petitioner contends (Br. 19–2
Board exceeded its powers in determi
employees in its three Earlington,
mines constituted an appropriate co
gaining unit, urging that only an en
unit could be found to be appropr
purposes of collective bargaining. T
upon which the Board based its appr
finding is set forth in the Statemen
5–6. This evidence showed the geog
aration of petitioner's Earlington
mines from its Sturgis, Kentucky, mi
fied supervision of the three Earli
and the extent of organization of pet
ployees. All of these are pertinent f
issue of the appropriate unit and p
a "rational basis" for the Board's
the employees in petitioner's three
Kentucky, mines constituted an app
gaining unit. *National Labor Relati
Hearst Publications, Inc.*, 322 U. S.
*May Department Stores Company
Labor Relations Board*, No. 39, this
burgh Plate Glass Co. v. *National
tions Board*, 313 U. S. 146, 152–1
Labor Relations Board v. *Botany W*
133 F. (2d) 876, 880–881 (C. C. A.
denied, 319 U. S. 751; *National La*

Board v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 21 (C. C. A. 9).

Petitioner's attack on the Board's unit finding is not based upon any evidence in the record upon which the finding was made by the Board but is predicated solely upon evidence introduced in an entirely separate representation proceeding, Case No. 14–R–988 on the records of the Board, involving the employees of petitioner's Poplar Ridge Mine, a mine not involved in the proceeding now before the Court. This separate proceeding was not initiated until over five months after the Board made the unit determination here in question, and while the record in this proceeding, upon motion of petitioner, was physically incorporated in the record before the court below in a separate volume entitled "Volume II, Case No. 14–R–988," the court, in effect, deferred ruling on the question of the propriety of its consideration of this evidence until final consideration of the cause.[7] The Board renewed its ob-

[7] The procedure by which the record in this separate proceeding was printed as part of the record before the court below may be briefly stated as follows: In its designation of the portions of the transcript to be contained in the printed record, required by the rules of the court below, petitioner designated for printing in the record before the court below the record in Board Case No. 14–R–988. Petitioner also included in its designation an alternative motion for leave to introduce as additional evidence the entire record in Board Case No. 14–R–988. The court below, on motion of petitioner, entered the following order:

"FEBRUARY 8, 1945.

"On motion of respondent, the record in case #14–R–988

jection to the court's consideration of the evidence in the Poplar Ridge Mine proceeding in its reply brief to the court below. In its opinion, the court below fully sustained the objection, overruling petitioner's motion to introduce as additional evidence before the Board the evidence in Case No. 14–R–988 upon the ground that petitioner had shown no adequate reason for failing to adduce the evidence in question at the hearing before the trial examiner in the prior proceedings (R. 329–330). Petitioner does not assign as error the action of the court in this regard and consequently, since the statute requires, as this Court has repeatedly held, that "the case must be heard on

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will be included as a part of the record in this case, subject however to objections, if any thereto, made by petitioner at the hearing."

The Board, in certifying the record in this separate proceeding to the court below recited the fact that the certification was being made solely pursuant to the order of the court, and that the Board was not thereby waiving its objection that the evidence in Case No. 14–R–988 was not properly before the court in that proceeding (R. 181–182). Thereafter, the court below, upon motion of the Board, entered the following further order:

"APRIL 6, 1945.

"The motion of the National Labor Relations Board with respect to the printing in a separate volume of the partial record 'In the Matter of West Kentucky Coal Company and United Mine Workers of America, District No. 23, Case No. 14–R–988,' is granted; but its motion with respect to reimbursement of the costs of printing such record in the event that the objection of the National Labor Relations Board to the consideration of the aforesaid partial record as a part of the record in this cause, is denied, as premature."

the record as certified by the Board,"[8] there is no question before this Court concerning the propriety of the Board's unit determination herein in the light of the evidence in Case No. 14–R–988, which is the only evidence upon which petitioner relies. The only question before the Court in this regard is whether there is a "rational basis" for the Board's unit determination herein upon the evidence upon which it was made, and this question, as has been shown at pp. 18–19, *supra,* can only be answered in the affirmative.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

DAVID A. MORSE,
General Counsel.

RUTH WEYAND,
OWSLEY VOSE,
Attorneys, National Labor Relations Board.

MAY 1946.

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[8] *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 405–406; *National Labor Relations Board* v. *Foote Bros. Gear and Machine Corp.*, 311 U. S. 620.

APPENDIX A

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (e) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be

reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, mod-

ifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B

The relevant provisions of the War Labor Disputes Act (Act of June 25, 1943, c. 144, 57 Stat. 163, 50 U. S. C. App. (Supp. IV) 1501, *et seq.*) are as follows:

* * * * *

SEC. 3. Section 9 of the Selective Training and Service Act of 1940 is hereby amended by adding at the end thereof the following new paragraph:

"The power of the President under the foregoing provisions of this section to take immediate possession of any plant upon a failure to comply with any such provisions, and the authority granted by this section for the use and operation by the United States or in its interests of any plant of which possession is so taken, shall also apply as hereinafter provided to any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith. Such power and authority may be exercised by the President through such department or agency of the Government as he may designate, and may be exercised with respect to any such plant, mine, or facility whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant, mine, or facility as a result of a strike or other labor disturbance, that the war effort will be unduly impeded or delayed by such interruption,

and that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort: *Provided,* That whenever any such plant, mine, or facility has been or is hereafter so taken by reason of a strike, lock-out, threatened strike, threatened lock-out, work stoppage, or other cause, such plant, mine, or facility shall be returned to the owners thereof as soon as practicable, but in no event more than sixty days after the restoration of the productive efficiency thereof prevailing prior to the taking possession thereof: * * *

SEC. 4. Except as provided in section 5 hereof, in any case in which possession of any plant, mine, or facility has been or shall be hereafter taken under the authority granted by section 9 of the Selective Training and Service Act of 1940, as amended, such plant, mine, or facility, while so possessed, shall be operated under the terms and conditions of employment which were in effect at the time possession of such plant, mine, or facility was so taken.

SEC. 5. When possession of any plant, mine, or facility has been or shall be hereafter taken under authority of section 9 of the Selective Training and Service Act of 1940, as amended, the Government agency operating such plant, mine, or facility, or a majority of the employees of such plant, mine, or facility or their representatives, may apply to the National War Labor Board for a change in wages or other terms or conditions of employment in such plant, mine, or facility. Upon receipt of any such application, and after such hearings and investigations as it deems necessary, such

Board may order any changes in such wages, or other terms and conditions, which it deems to be fair and reasonable and not in conflict with any Act of Congress or any Executive order issued thereunder. Any such order of the Board shall, upon approval by the President, be complied with by the Government agency operating such plant, mine, or facility.

* * * * *

SEC. 7. (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Numbered 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes," and by any other statute, shall have the following powers and duties:

(1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive

the Board of jurisdiction t
hearing and order.

(2) To decide the disput
by order the wages and hour
terms and conditions (custor
in collective bargaining agr
erning the relations betwee
which shall be in effect unti
of the Board. In making
sion the Board shall confor
visions of the Fair Labor
of 1938, as amended; the N
Relations Act; the Emerger
trol Act of 1942, as amende
of October 2, 1942, as am
other applicable provisions
where no other law is appli
of the Board shall provide
conditions to govern relatio
parties which shall be fair
to employer and employee
circumstances of the case.

APPENDIX C

The relevant provisions of the Regulations of the Secretary of the Interior dated May 19, 1943 (8 F. R. 6655, as amended by 10712 and 11344) concerning the operation of coal mines under government control are as follows:

§ 603.1 These regulations are issued under the authority of Executive Order No. 9340, dated May 1, 1943 (8 F. R. 5695), authorizing and directing the Secretary of the Interior * * *

"* * * to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal."

§ 603.2 These regulations shall govern the operation of all coal mines placed under Government control pursuant to Executive Order No. 9340 by orders of the Secretary of the Interior of May 1, 1943 (8 F. R. 5767) taking possession of all coal mines operated by the companies specified in the appendices attached thereto, including any and all real and personal

property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines and the distribution and sale of their products, for operation by the United States in furtherance of the prosecution of the war.

* * * * *

§ 603.5 (a) Control of the operations of the coal mines will be exercised by the Government to the extent necessary to maintain maximum production. Wherever the cooperation of the company and its personnel can be secured, the existing organization of the mining company will be utilized, and the company will continue operation in the regular course of business as a going enterprise, conforming with such directions as the Government may issue. Where the prompt and effective cooperation of a company cannot be secured, appropriate action will be taken under §§ 603.30 and 603.31 of these regulations.

(b) All properties in the possession of the Government shall be operated in a manner consistent with the fact that title to the properties remains in the owners thereof and that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production.

* * * * *

§ 603.15 (a) The operation of the coal mines of a mining company will ordinarily be entrusted to an officer of the company formerly in charge of operations who is authorized to act for the said company and who will, under appointment by the Administrator, during the period of Government control, act as Operating Manager for the

United States, while continuing to serve as an officer and employee of the mining company. At the request of the said company, such person may be removed from the position of Operating Manager for the United States, and an officer or employee of the company nominated by the company may be appointed by the Administrator.

* * * * *

§ 603.16 (a) Any officer or employee of a mining company who, with the permission of, or without objection from, the said company, accepts designation as Operating Manager for the United States of the coal mines of said company shall, together with all other officers and employees, serve in full recognition of his responsibilities to the Government and subject to all orders and regulations of the Administrator, but he and all other officers and employees shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control of its property.

* * * * *

(c) Designation of any person as Operating Manager for the United States shall not be deemed to constitute him an officer or employee of the United States within the meaning of Federal statutes governing personnel.

* * * * *

§ 603.17 (a) Operating Managers shall perform for their companies ordinary duties of management in accordance with established policies and practices, so far as consistent with these regulations and the instructions and orders of the Adminis-

trator and Regional Managers, and shall in addition perform all special duties placed on them as Operating Managers of the United States by these regulations, by their appointment instructions, so far as consistent with these regulations, and by such orders as the Administrator or the Regional Managers may issue.

(b) An Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States (name of company)," [801.17, 8 F. R. 10712] as hereinabove and hereinafter specified. No Operating Manager for the United States of any mining company is authorized or shall be regarded as having authority, express or implied, to bind or impose any liability on the United States or any of its officials or agents in the absence of a specific direction or order by the Administrator to that effect. Nor shall any operations of any mine property in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator.

* * * * *

§ 603.23 (a) In accordance with Executive Order No. 9340, the customary working conditions shall be maintained in all mines.

(b) In accordance with the terms of Executive Order No. 9340, the customary machinery for the adjustment of workers'

grievances shall be maintained in all mines and the right of the workers shall be recognized to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operation of the mine.

(c) All benefits enjoyed by employees of the mine under private control, including State and Federal insurance payments and benefits, workmen's compensation coverage, and group insurance, and all arrangements governing the payment of wages, including war bond purchase plans and the check-off of union dues, shall be continued.

* * * * *

(1) All personnel of the mines, both officers and employees, shall be considered as called upon by Executive Order No. 9340 to serve the Government of the United States, but nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment.

§ 603.24 (a) The mining companies, their personnel and their property are deemed to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies. The companies are expected to meet all Federal, State and local taxes, contributions, and assessments in the customary manner.

(b) The mining companies are deemed to remain subject to suit as heretofore.

However, no Operating Manager or Regional Manager is authorized to bring suit, accept service, or enter any legal proceeding, on behalf of the United States without specific direction from the Administrator. * * *

* * * * * * *

Order 1888 of the Secretary of the Interior, dated November 1, 1943 (8 F. R. 15199), is as follows:

NOVEMBER 1, 1943.

By virtue of the authority vested in me by the President of the United States by Executive Order dated November 1, 1943,[1] and having determined that a strike or stoppage has occurred or is threatened at each and all of the coal mines operated by the mining companies listed in Appendix A,[2] attached hereto and made a part hereof, I do hereby, effective forthwith, take possession of each and all of such coal mines, including any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines.

The Regulations for the Operation of Coal Mines Under Government Control, as amended (8 F. R. 6655, 10712, 11344), heretofore issued by me, together with such further regulations as may from time to time be issued, shall in all respects be applicable to the mines possession of which is taken by the Government.

The President of each of the mining companies listed in Appendix A[2] heretofore referred to (or if there is no president, its chief executive officer) is hereby, and

[1] E. O. 9393, 8 F. R. 14877.

[2] Filed as part of the original document.

until further notice, designated operating manager for the United States for each and all of the mines of the company. Unless advice to the contrary is received within ten days, the aforesaid President (or chief executive officer) shall be deemed to have accepted such designation. As operating manager for the United States, he is authorized and directed to operate any and all such mines in accordance with the aforementioned Regulations for the Operation of Coal Mines Under Government Control, and such further regulations as may from time to time be issued, and to do all things necessary and appropriate for the operation of such mines and for the production, distribution and sale of their products.

The operating manager for the United States shall forthwith fly the flag of the United States at each of the mining properties of his company and shall conspicuously display at each of such properties copies of a poster to be supplied by the Department of the Interior and reading

"NOTICE

"In accordange with the proclamation of the President of the United States, Government possession of the coal mines of this mining company has been taken by Order of the Secretary of the Interior."

HAROLD L. ICKES,
Secretary of the Interior.

APPENDIX D

The relevant provisions of Article III of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended (8 F. R. 16047, as amended by 9 F. R. 7745) are as follows:

> SECTION 1. A petition to investigate and certify under Section 9 (c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer. * * *
>
> * * * * *
>
> SEC. 3. After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation by issuing a Notice of Hearing * * *.
>
> * * * * *
>
> SEC. 6. The hearing upon the question of representation shall be conducted by a Trial Examiner designated by the Board or the Chief Trial Examiner, and shall be open to the public unless otherwise ordered by the Trial Examiner. * * *
>
> * * * * *
>
> SEC. 8. Upon the close of the hearing the Regional Director shall forward to the Board in Washington, D. C., the petition, Notice of Hearing, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence,

and depositions, all of which shall constitute the record in the proceeding.

SEC. 9. The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1940